12

No. 10,147

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CASH COLE,

Appellant,

vs.

WALLIS GEORGE,

Appellee.

Upon Appeal from the District Court for the Territory of Alaska Division Number One.

APPELLANT'S REPLY BRIEF.

HAROLD H. BATES,
Sitka, Alaska,
CHARLES BAGBY,
Hearst Building, San Francisco, California,
Attorneys for Appellant.

Subject Index

Table of Authorities Cited

Cases

Statutes

Texts

No. 10,147

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CASH COLE,

Appellant,

vs.

WALLIS GEORGE,

Appellee.

Upon Appeal from the District Court for the Territory of Alaska Division Number One.

APPELLANT'S REPLY BRIEF.

The appellee's brief argues numerous questions of law. We believe that but one of these is important. That is, does Section 923, Compiled Laws of Alaska for 1933, require that written notice be served upon both the president and treasurer of a corporation to give the stockholder a cause of action? We shall devote the major portion of this reply brief to that point. Questions concerning the necessity of joining both officers; of what constitutes an "aggrieved" stockholder and whether the act is repugnant to the due process clause of the United States Constitution we consider to be minor points worthy of but little reply.

THE ARGUMENT.

The decision of the learned Court below is infused with a subtle error in logic and the appellee's brief mirrors the same mistake. Whether a written notice must be alleged to have been made on both the president and the treasurer of a corporation before recovery can be had under the statute is primarily a matter to be determined by inspecting the statute itself. It is set forth on pages two and three of the appellant's brief.

The Act speaks in the singular number.

Observation shows us that the first paragraph of the statute states the performance required by the Territory. The second paragraph fixes the time in which that performance is to be made. The third paragraph levies a penalty upon the corporation for failure of compliance. The fourth paragraph, with which we are most concerned, levies a penalty upon the officers whose act is necessary for the corporation's performance, and specifies the conditions under which those officers become liable. Does this paragraph require that demand be made upon both the president and the treasurer? As far as the language is concerned we note that the law states

> "* * * either of such officers who shall thereafter refuse or neglect to make and file such reports within ten days after a written request to do so shall have been made by a creditor or a stockholder * * *"

shall be liable for the penalty provided. "Either" means a single person, one of two, and the legislature

is obviously speaking and thinking in the singular number. If we omit the connective language we find that the substance reads "* * * either * * * after a written request * * *" shall be liable. As far as the language is capable of grammatical analysis it is apparent that the written request is to be made upon either of the officers.

On the contrary, if it had been the legislature's intent to provide that the request must be made upon both, then it would have been simple enough for the legislature to supply the requisite language, as we do here in parentheses:

> "* * * either of such officers who shall thereafter refuse or neglect to make and file such reports within ten days after a written request (upon both) to do so shall have been made by a creditor * * *"

shall be liable. As we say, in consideration of the facility with which this addition could have been made, we must conclude that its absence is intentional, and that the legislature did not add the words "upon both" because it did not intend to require a demand upon both. If we are to construe this statute as did the District Court, then we must read into the statute words that are not there and we must disregard the words actually used.

In the opinion of the District Court, at the bottom of page eleven of the transcript, we find the crux of the decision in the following words:

> "* * * the law makes it their joint duty to file such report, and therefore before recovery can be had

> under the statute against either the president or treasurer of such corporation a demand must be made upon both the president and treasurer of such corporation * * *''

No reasons are given in the opinion why the demand must be made on both officers. This mere conclusion of law is supported by no argument and, in fact, is not arrived at by any demonstrable process of logic or deduction. It is, indeed, a supplying to the statute of the words "upon both" that the statute lacks.

Penal statutes must be construed to determine the intent of the legislature.

Grammatical analysis, no matter how favorable the results be to the appellant's position, is not the only means of determining that it was not the intent of the legislature to require service of demand upon both officers. We think that this statute bears further evidence of our contention and we shall proceed with its construction. But it is not inappropriate at this point to discuss what should be the proper attitude for the Court in construing a law of this type. On page five of the appellee's brief is found the statement that this is a penal statute and should be strictly construed. We now show the Court the judicial acceptation of that rule.

Statutes of this type were formerly more prevalent than they are today. The term "penal statute" was frequently used in characterizing them, and the rule of strict construction was often stated. Later cases have brought into question the meaning of the phrase "penal statute", and the legal fashion of more re-

cent times seems to require that they be called "remedial statutes". Certainly many of the incidents of penal statutes do not apply to them. For example, the rule is well known that one state will not enforce the penal statutes of another. Yet in *Huntington v. Attrill,* 46 U. S. 657, 36 L. Ed. 1123, 13 Sup. Ct. 224, the Supreme Court of the United States approved such enforcement of a statute very similar to the one in this case. The whole question is thoroughly discussed there.

Even the older cases stating the doctrine of strict construction have nevertheless said that the Courts were not justified in taking an unreasonable view of their meaning which would defeat the purpose of the statute. *Cooper v. Nutt,* 254 Ill. App. 445, and many other cases have insisted that the construction to be given to them is one that will enable the legislature's intent to be carried out. To the same effect are *Strope v. Albank Steel, etc., Co.,* 279 N. Y. S. 8, 162 Misc. 934, affirmed 299 N. Y. S. 400, 252 App. Div. 311; *St. John v. Eberlin,* 51 N. Y. S. 998, 23 Misc. 585, 5 N. Y. Ann. Cas. 247. We can summarize the doctrine briefly as this: The ordinary rules and methods of construction are to be applied to the statute to determine the legislature's intent. Once that intent has been found, a plaintiff is required to show that he comes within the statute, and no extensions are made to cover a case which approaches but does not achieve the statutory requirement. But let it be understood that no court has held that the rule of strict construction justifies a refusal to discover the legislature's intent; nor has any

court held that the usual methods of construction are not to be applied to statutes of this type.

Construing the statute as requiring demand on one officer only would not be productive of hardship or unjust result.

It is a well known rule of construction that if two meanings can be placed upon a statute, that one must be avoided which will produce hardship or unjust results in the statute's operation. The appellee argues in the middle of page ten of his brief: "Certainly the statute should not be construed so as to penalize the treasurer of a corporation severally for neglecting to perform a duty which the statute specifically provides can only be performed by the treasurer and president jointly" and in the opinion of the District Court we find the following statement (Transcript, page 12):

> "Such a demand, we think, is insufficient, for the reason that even had the treasurer furnished or filed a report made and verified by himself only, it would not be a compliance with the statute, which requires a report signed and verified by both the president and treasurer."

From these statements it is apparent that the appellee and the learned Court below share the opinion that to hold that this statute permits a demand upon "either" officer would be productive of injustice and should be avoided. With this principle we have no quarrel; but with the application to the present statute we believe that the appellee and the District Court have erred. We desire to meet this point squarely,

because we believe that it is the true *ratio decidendi* of the District Court.

What did the Court below envision as the unjust result that might follow from holding that this statute did not require a demand upon both officers? Briefly, it is this: Suppose the present appellee, the treasurer, had been ready and willing to comply with the act but that he was prevented from doing so by the refusal of the president. The treasurer we may assume to have been served with a demand; the president is not. Since no demand has been made upon him, the president is not under the spur of action and the threat of mulcting by the penalties of the statute and consequently has no incentive to recede from his refusal. Now, says the District Court, in the language quoted above

> "* * * even had the treasurer furnished or filed a report made and verified by himself only, it would not be a compliance with the statute which requires a report signed and verified by both the president and treasurer."

Consequently, we are to infer that it follows that the treasurer, though anxious and willing to perform his duty is made liable because he cannot alone perform the exculpatory act. The Court below assumes that only by filing a report made and executed by both president and treasurer can liability be avoided.

If such a result would follow—or even might follow—from a holding that the statute did not require a demand on both, then a Court might well do a little violence to the language of a statute without departing

from the nature of the judicial process. Much may be ventured to avoid injustice.

But such results would not flow from the view that this statute does not require a demand on both officers. The appellant in his argument and the Court in its opinion have fallen into the error of assuming that only by the filing of a report made and executed by both would liability be avoided. But the statute does not so provide. Its provisions to the contrary are express and unmistakable. The fourth paragraph of the act in question does not penalize a *mere* failure to file the report, nor is a cause of action created merely because the report was not filed after demand. The language is specific, and to give rise to a cause of action it requires that the officer *"refuse or neglect"* this duty. The penalty itself repeats this phrase only a few words farther on and provides that fifty dollars shall be recoverable "for every day he or they shall so *neglect or refuse"*.

An officer ready and willing to perform could never be made liable; it is the officer who contumaciously refuses or neglects compliance with the law who feels its sanction.

The distinction drawn here is one that is supported by decided cases. In *Nassau Bank v. Brown,* 30 N. J. Eq. 478, the Court construed a very similar statute in which a penalty was imposed upon directors who should "neglect or refuse" to make certain reports. That Court held that in the absence of an allegation of neglect or refusal to act, a cause of action was not

made out, though the report had not been made and filed as required by law. In *Gennert v. Ives,* 102 Mich. 547, 61 N. W. 9, a statute containing the phrase "willfully neglect or refuse" and requiring the making and filing of a certain report by a corporation was construed by the Court to mean that a mere failure to make the report, not accompanied by a neglect or refusal to do so, did not provide ground of recovery.

These cases are persuasive authority for the conclusion that a willing treasurer, under the present statute, would not be subject to the penalties, although no report made and executed as required by the law had ever been filed. And it is submitted that this Court could well find that the statute in question was scientifically drafted precisely for the purpose of preventing the unjust result which otherwise might flow from permitting the demand to be served upon one officer only.

Construing the statute as allowing a demand on either officer aids in the achievement of the legislature's purpose.

It is a well known rule of construction that when more than one meaning can be placed upon a statute, that one should be chosen which will facilitate the legislative purpose, and constructions should be avoided that will tend to the frustration of that purpose. As we said at the beginning of this argument, the first paragraph of the statute states the compliance required by the legislature. The third paragraph is concerned with the effect of non-compliance. Under

that paragraph the mere absence of the stipulated report from the file of the auditor and from the file of the clerk results in the imposition of a penalty against the corporation. The fourth paragraph is not so much concerned with the fact of non-compliance as it is with the reason therefor.

The compliance with paragraph one requires the joint act of two officers, but non-compliance can be created by *one* officer. One officer, by neglecting or refusing to act, can prevent the other—no matter how willing—from making, verifying and filing the required report. We should not deny to the legislature the ability to see this fact. Nor should we think that a legislature that had foreseen this possibility did not undertake to redress the mischief where it existed. If either officer can prevent compliance, is it not reasonable that the statute should provide that demand be served upon such officer?

On the other hand, if we assume that one officer is willing to comply and the other neglects or refuses to do so, is it reasonable that, as the appellee contends, the statute requires demand made upon both? As we have seen above, the willing officer, under this statute, is liable for no penalty. What, then, is to be achieved by demanding of him that he do an act that he is ready and willing to do? This is certainly a vain act; and construction that would result in a vain and bootless act must surely be unreasonable. On the contrary, to require service of the demand upon the unwilling officer only is to strike at him who obstructs the compliance required by the legislature. To say

that service upon him alone is not sufficient to make him subject to the penalties is to blunt the goad the legislature sharpened for his encouragement. The effect is to make more difficult the enforcement of the legislative will.

If both officers refuse compliance with the statute, the view of the Court below and of the appellee that both must be served, would, by increasing the burden on the party plaintiff, tend to decrease the facility with which the legislative purpose could be achieved. Those who refuse compliance with the law would not be reluctant to adopt tactics by which its sanctions are to be evaded. By that view both would have to be present before either could be made liable. If either was absent, they might continue a course of willful disobedience in complete immunity. This statute should not be construed so as to permit such result.

To permit the demand to be made upon the officer neglecting or refusing without regard to his fellow officer is, we submit, the view that would facilitate the end to be achieved by this statute, would avoid a burden upon the party plaintiff that in many instances would be insupportable; would avoid the unreasonable need of serving a willing officer and would prevent successful conspiracies whereby both officers might refuse with impunity.

The statute creates a joint and several liability upon the officers.

In the case below one of the appellee's grounds of demurrer was that there was a non-joinder of a nec-

essary party defendant and in his brief, on page ten, he argues that the president of the corporation should have been joined.

In discussing statutes of the type with which we are here concerned the following appears in 2 Thompson on Corporations (3rd Ed.) 1011, Sec. 1451:

> "Peculiar wording of some of these statutes leaves doubtful the question as to whether the action must be against one or a number. This may depend largely on the wording of the particular statute."

It is submitted that the particular wording of paragraph four of the present statute by its very terms creates a joint and several liability against either or both the president and treasurer and that the District Court properly so held in its opinion (Transcript p. 11).

An aggrieved stockholder is one who brings himself within the terms of the statute.

The appellee's brief under point 2, page 11, argues that the present appellant is not an "aggrieved" stockholder within the meaning of that term as used in the statute in question.

The language of the statute clearly shows that it was the purpose of the legislature to permit any stockholder who had complied with the requirements of this section and under the circumstances therein stipulated to have a cause of action and recover the amount provided. The appellee now argues that since

the legislature calls such a stockholder "aggrieved" he must have suffered some legal loss or injury in addition to his being the stockholder designated by the law as being entitled to recover. Such logic is self-defeating. On page 12 of his brief he defines "aggrieved" as one who is injured in the legal sense—in short, we may say, one who has a cause of action. If the present appellant has complied with the statute he has a cause of action and consequently is "aggrieved".

In *Kelsey v. Pfaulder Process etc. Co.,* 3 N. Y. S. 723, the Court construed a statute of New York and held that as used in that statute the term "injured party" was a stockholder to whom an officer of a corporation "refused or neglected" to exhibit the stock book and that no showing of additional injury was necessary for the plaintiff therein to qualify as an injured party. *Buker v. Steele,* 43 N. Y. S. 346 (Co. Ct.), construed a later Act of New York requiring the stock book of any corporation to be exhibited to any stockholder and inflicting a penalty of fifty dollars per day against officers who "neglect or refuse" so to exhibit, to be recovered by "the party injured". That Court held that the denial of the right to inspect was the injury contemplated by the statute and was sufficient to subject the defendant to the penalty without any showing of any other injury by the stockholder or creditor plaintiff.

The statute is not repugnant to the Constitution of the United States.

Under point 3 of his brief, page 13, the appellee contends that the statute under examination is repugnant to the due process clause of the Constitution of the United States. He argues in part: "We have not been able to find a similar statute anywhere assessing such a heavy and arbitrary penalty against officers of a corporation personally in favor of creditors and stockholders; and without any showing required by such creditors or stockholders that they were in some way damaged or injured in consequence of failure to file a report." (Appellee's Brief p. 3.)

In 2 Thompson on Corporations (3rd Ed.) *sub nomine* "Directors" there are cited literally hundreds if not thousands of cases arising from just such statutes. And in consequence we dare to say that similar statutes either now are, or have been, the law of every state of the Union.

The present statute has never had its constitutionality determined in any court, nor has research enabled us to produce a constitutional holding by the Supreme Court of the United States on any similar statute. The Supreme Court has had cases before it which arose under penal statutes of this type, but apparently the constitutional question has never been raised. For example, see *Huntington v. Attrill,* 46 U. S. 657, 36 L. Ed. 1123, 13 Sup. Ct. 224. Cases based on statutes of this type have been before District Courts of the United States and before the

United States Circuit Court of Appeals, but in no case has a holding of unconstitutionality been made.

The appellee argues that the amount of the penalty renders this statute invalid (Appellee's Brief pp. 14, 19). The fifty dollar a day penalty is indeed small in comparison with many statutes enacted in the several states which render officers or directors liable for "all the debts of the corporation" for failure to file certain reports. And for example, the State of California formerly had a statute imposing a penalty of one thousand dollars for a single failure to file a report. *Anderson v. Byrnes,* 122 Cal. 272, 54 P. 821, reviews the litigation under this law and therein states that the statute gave rise to many cases. Yet so highly was this enactment regarded that the *Anderson* case was under the necessity of deciding that it had been constitutionally *repealed.*

The cases on constitutionality cited by the appellee are not in point. Not one concerns a statute giving a right of recovery to a stockholder for the purpose of enforcing the state's visitatorial power over a corporation.

In the absence of a holding that a statute such as the one here involved is unconstitutional, the acquiescence of the state and federal Courts in the enforcement of similar statutes in hundreds of cases for a period of eighty years is indicative of this statute's constitutional validity.

CONCLUSION.

We submit that the judgment of the District Court should be reversed and this case sent down for further proceedings.

Dated, San Francisco, California,
September 21, 1942.

Respectfully submitted,
HAROLD H. BATES,
CHARLES BAGBY,
Attorneys for Appellant.